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PROTECTION OF THE GERMAN SYSTEM OF CONTROLLING EMPLOYMENT BY COLLECTIVE AGREEMENT

BY RALPH F. FUCHS

I. THE ATTACK UPON STATE RESPONSIBILITY

The success of the post-war German system of regulating employment by collective agreement, which has been described in a previous number of the REVIEW,¹ is of course bound up with the fate of the present German government and economic system. Thus far, although wages have been subjected along with prices and interest rates to regulation by emergency decree,² there has been no important change in the permanent structure of control. Despite considerable opposition, the basic features of that structure have survived the transition from a social-democratic to a centrist government. The available figures, moreover, indicate that mounting unemployment had not, prior to 1930, diminished the use that was being made of collective agreements. On the contrary, these played a greater part in 1929 than previously in laying down the terms and conditions of work.³ Nor was the strong arm of the government more prominent than before in maintaining the system, for membership in the unions showed a slight increase⁴ and the proportion

¹ Fuchs, *Collective Labor Agreements in German Law* (1929) 15 ST. LOUIS L. REV. 1.

² See N. Y. TIMES, Dec. 13, 1931, III, 3, 6, and Dec. 27, 1931, IX, 3, 6, for accounts of the drastic decree which went into effect Jan. 1, 1932.

³ The following table, supplementing that in 15 ST. LOUIS L. REV. at p. 45 n. 114, shows the growth in the use of collective agreements during recent years:

| Date | No. of Agreements | No. of Establishments | No. of Workers |
|--------------|----------------------|--------------------------|-------------------|
| Jan. 1, 1925 | 7099 | 785,945 | 11,904,159 |
| Jan. 1, 1926 | 7533 | 788,755 | 11,140,521 |
| Jan. 1, 1927 | 7490 | 807,300 | 10,970,120 |
| Jan. 1, 1928 | 8178 | 912,006 | 12,267,440 |
| Jan. 1, 1929 | 8925 | 997,977 | 12,276,160 |

⁴ Hoeniger, Schultz, & Wehrle, *JAHRBUCH DES ARBEITSRECHTS*, vol. IX (1930) 18. For an account of the mounting unemployment, which since has increased still more, see *ibid.* 27; Schacht, *THE END OF REPARATIONS* (1931) 196. The membership of German unions is understated in 15 ST. LOUIS L. REV. at p. 45. When unions of all sorts, including those of employees of public corporations, are added in, the total for 1925 is 8,196,035 out of 21,033,133 employed persons inclusive of domestic servants.

of truly voluntary agreements rose somewhat in 1928 as compared with previous years.⁵

Apparently, however, the continued application of control by agreement has been accompanied by increasing opposition on the part of employers to one of the compulsory features of the system. As has been pointed out,⁶ the German law gives every encouragement to the formation of voluntary collective labor agreements, which are legally enforceable and which may be extended by the Minister of Labor to apply to labor contracts that otherwise would not come within their scope. In addition, a dispute between employers and workers, unless an agreement is reached, becomes subject to "conciliation" proceedings which in some instances of especial public importance are initiated by the government. The outcome of these proceedings, if the parties cannot be brought to agree, may in the discretion of the official conciliator or of the Minister of Labor be an "agreement" imposed upon the parties, which will have as much force as if it had been concluded voluntarily.⁷ Thus the political state to some extent assumes the responsibility for justice in industrial as well as other human relations. It does so upon the dual theory that the German Constitution imposes upon the government the duty of safeguarding the interests of workers⁸ and that the public welfare requires the maintenance of industrial peace.⁹

The charge has been freely made that the social-democratic government during its incumbency sought to strengthen itself with its constituents rather than to serve the interests of justice by the terms of the "agreements" which it imposed, thus encouraging agitation on the part of workers and handicapping

REICH SARBEITSBLATT, SONDERHEFT 36 (1927) 12. Schacht gives the number of gainfully employed as 33 million, doubtless including public officials and the professional classes. THE END OF REPARATIONS, 195.

⁵ Ham, *The German System of Arbitration* (1931) 15 J. POL. ECON. at pp. 12-13.

⁶ 15 ST. LOUIS L. REV. at p. 41.

⁷ See Ham, *op. cit.* n. 5 above, for a fuller account of this feature of the German system of control.

⁸ Arts. 151 and 157.

⁹ Sinzheimer, *Zur Frage der Reform des Schlichtungswesens*, RABL. 1929, II, 149-153. Schacht condemns "the dominant theory that it is the function of the state to care for the maintenance of the individual citizen." THE END OF REPARATIONS, 85.

German industry in international competition by an unduly high level of wages.¹⁰ In reply it is pointed out that inevitably industrial disputes, if settled at all, must be settled on a basis of social policy, and the real question is over the proper policy to pursue. What the objectors really wish, unless they desire chaos, is settlements according to their own policy, which the economic strength of employers in a time of depression would enable them to enforce, rather than according to the policy applied by the government. The latter, it is maintained, is quite capable of being supported for valid reasons which, while they are political in the best sense of the term, are by no means political in the sense of selfish partisan politics.¹¹ Thus one of the principal features of the German system of control of employment relations has become an important issue in the political arena.

II. JUDICIAL TREATMENT OF THE IMPAIRMENT OF AGREEMENTS BY THE PARTIES

Meanwhile the recently-established labor courts¹² have produced a surprising number of reported cases upon all aspects of labor law,¹³ including collective agreements. It is not pretended that these cases have been exhaustively gone over as a basis for what follows. Enough have been examined, however, to show the recent treatment of several questions which relate to possibly the central problem connected with collective agreements—the problem, namely, of the adequate protection of such agreements against impairment by outsiders or by the parties themselves when their immediate interests lead them into subversive activity.¹⁴

If an organization of workers or employers desired to evade the obligations of a collective agreement to which it was a party, a fairly obvious way of trying to do so would be for the organi-

¹⁰ THE END OF REPARATIONS, 187. Ham, *op. cit.* n. 5 above.

¹¹ Sinzheimer, *op. cit.* n. 9 above.

¹² 15 ST. LOUIS L. REV. at p. 5.

¹³ A privately published series of reports (Mannheim, 1926 ff.), succeeding the two volumes of decisions of the *Reichsgericht* in labor cases previously drawn upon (15 ST. LOUIS L. REV. at p. 6, n. 18), and devoted principally to the decisions of the *Reichsarbeitsgericht*, had reached ten substantial volumes by the end of 1930. It will be cited herein as *RAG*.

¹⁴ See *op. cit.* n. 1 above for an account of the legal remedies which may be invoked in support of collective agreements.

zation to disintegrate. It is the view of one commentator that the Civil Code would continue an agreement after the dissolution of one of the organizations which were parties to it if that organization were a registered association.¹⁵ Most German unions, however, are unregistered,¹⁶ and it has been held that a collective agreement cannot survive the dissolution of a contracting party of this type. In the case in question the action was brought by a union of newspaper employees to establish the validity of an agreement which it had with an association of publishers. The association had had four members but had dwindled in number to two. One of these two, a co-defendant in the case along with the association, was resisting a wage scale which had been incorporated into the agreement by the imposition of a conciliation decree. After the labor court had rendered judgment for the plaintiff, the defendant association was formally dissolved. The *Landesarbeitsgericht*, when the case later came before it, adjudged that the agreement and the imposed wage scale were in effect until the date of the dissolution but that they ceased to have either normative or obligatory force¹⁷ after the association ended its existence. The decision of the court below was affirmed by the *Reichsarbeitsgericht*, but it was held that it should have been rendered against the individual defendant only, since by its dissolution the association ceased even to be a party to the action.¹⁸ Whether the courts would hold a successor association to agreements to which its predecessor had been a party does not appear, but there seems to be no obstacle to such a result in the case of unregistered associations, whose legal existence in any event is simply the recognition of a fact.

As previously noted,¹⁹ an effort is sometimes made in advance to invalidate imposed agreements by inserting a provision into the constitution of an association specifically denying it the power to enter into collective agreements. Such an effort will be unsuccessful in any case in which an organization has the

¹⁵ Nipperdey, anno. to 8 *RAG*. 128.

¹⁶ 3 International Labour Office, *FREEDOM OF ASSOCIATION* (Studies & Rep. Series A, no. 31) p. 37.

¹⁷ See 15 *ST. LOUIS L. REV.* at p. 11 for the explanation of these terms.

¹⁸ 8 *RAG*. 128 (Oct. 26, 1929).

¹⁹ 15 *ST. LOUIS L. REV.* at p. 32.

regulation of employment as one of its functions.²⁰ Hence it is impossible to have the advantages of collective action without accepting at least some of its obligations. An imposed agreement has even been held valid in the case of a registered employers' association whose constitution explicitly denied it the power to regulate in any way the employment of the class of workers covered by the decree, where the fact appeared that the association actually had concerned itself with the relations of its members to that class of employees.²¹

Occasionally the courts are called upon to deal with a disregard by conciliation authorities of an existing agreement between the parties to a dispute, which one of them is interested in avoiding. The important decision of January 22, 1929, declaring an imposed agreement which conflicted with an existing agreement to be invalid,²² was followed shortly afterward in a case in which an employers' association sought a declaration of the continued validity of an agreement notwithstanding the subsequent imposition of another. The original agreement provided for its termination only upon March 31 of any year after three months' notice, and no such termination had taken place. The original agreement was held to be still in force.²³

A related situation arises when a party to a collective agreement seeks to evade it by entering into another with an affected party. This is the case, for instance, where a union forces a particular employer, although he is a member of an employers' association with which the union has a contract, to enter into an agreement which is more favorable to its members than the original one. Undoubtedly its action is a breach of the original agreement and is redressable as such,²⁴ but the courts have not held this fact to be determining in ascertaining which agreement shall have normative force as regards the labor contracts of the union's members with the employer.²⁵ There is no applicable legislative provision. In the case just cited²⁶ the

²⁰ 5 RAG. 537 (Apr. 10, 1929).

²¹ 5 RAG. 543 (Apr. 10, 1929).

²² 15 ST. LOUIS L. REV. at pp. 39-40.

²³ 5 RAG. 411 (Feb. 2, 1929).

²⁴ Nipperdey, anno. to 9 RAG. 601.

²⁵ 9 RAG. 88 (Apr. 9, 1930).

²⁶ N. 25 above.

matter is settled by preferring the agreement which is most restricted in its scope. A stenographer sued for compensation according to an agreement which had been extended²⁷ to apply to the electrical business in all of Baden. The defendant employer relied upon a local agreement between the plaintiff's union and a number of employers' associations, including the defendant's, which applied to a large number of establishments in different trades. The *Reichsarbeitsgericht* held that if there were no other criterion the geographically more restricted agreement would control. In this case, however, the Baden agreement applied to only one line of business and the local agreement to many, so that the former took precedence. In a slightly later decision the *Reichsarbeitsgericht* adopted the principle that the agreement most advantageous to the worker should control except where individual labor contracts made explicit reference to the other²⁸—a holding which seems to place a premium upon contract breaking by unions. On the same date it was held that the Minister of Labor in extending an agreement may, if he provides against its impairment by a subsequent agreement, invalidate a later contract which conflicts with the terms of the extended one.²⁹ Shortly afterward it was held that an extended agreement supersedes the normative provisions of prior voluntary agreements.³⁰ The Collective Agreement Ordinance lays down its own rule for determining conflicts between two or more extended agreements.³¹ An arrangement between an employer and a works council, if it introduces terms into the affected labor contracts that are more advantageous to the workers than those incorporated into a collective agreement, is effective under the Collective Agreement Ordinance, which permits variations in

²⁷ See 15 St. Louis L. Rev. at p. 10 for a discussion of the extension of agreements.

²⁸ 9 RAG. 601 (Jul. 2, 1930).

²⁹ 9 RAG. 599 (Jul. 2, 1930).

³⁰ 10 RAG. 363 (Oct. 4, 1930).

³¹ "When a labor contract comes under several extended collective agreements, in case of conflict that one controls which contains provisions applicable to the largest number of labor contracts in the establishment or section of the establishment, unless the Federal Labor Office has provided otherwise." TVO. sec. 2, par. 2. See 15 St. Louis L. Rev. at pp. 34-36 with reference to the construction of decrees of extension for the purpose of determining their scope.

individual contracts that are favorable to the workers.³² Obviously the decisions in this field are not on a satisfactory basis.³³ They do not form a coherent body of law, and they do not encourage good faith on the part of workers.

In the matter of the responsibility of associations, liability of their members for their breaches of agreement is somewhat more restricted than was stated in the prior discussion.³⁴ Although it is true that in strict theory the members of an unregistered association are suable upon its obligations, this liability is negatived where the articles of association are inconsistent with it.³⁵ Hence the unregistered association, if it wishes to provide against personal liability on the part of its members and if it is willing to evaporate upon occasion, may enjoy a large measure of immunity from legal responsibility.³⁶

III. PROTECTION OF COLLECTIVE AGREEMENTS FROM OUTSIDE COMPETITION

The system of control by collective agreement, as is shown in the statistics previously set forth, by no means covers the entire field of employment in Germany. Despite the official imposition and extension of agreements, the structure of control rests upon a foundation of voluntary employee organization. The unions have not as yet succeeded in organizing quite two-fifths of the employed persons, and collective agreements applied in 1929 to about four-sevenths of those who were employed. Consequently the protection against outside competition of the wages and other conditions laid down by agreement continues to present a problem to the organizations in many trades and in-

³² *TVO*. sec. 1; 9 *RAG*. 140 (Apr. 30, 1930). An agreement between an employer and a works council has normative force but, unlike the collective agreement, may be departed from in individual labor contracts. 10 *RAG*. 407 (Nov. 1, 1930); 2 Hueck & Nipperdey, *LEHRBUCH DES ARBEITSRECHTS* (Mannheim, 1930) p. 347; Nipperdey, *anno.* in 8 *RAG*. at p. 128. The statement regarding the more limited legal effect of agreements made by works councils, 15 *ST. LOUIS L. REV.* at p. 47, does not seem to represent the prevailing view.

³³ *Op. cit.* n. 24 above.

³⁴ 15 *ST. LOUIS L. REV.* at p. 8, n. 21.

³⁵ Bringmann, *FRIEDENSFFLICHT UND TARIFBRUCH* (Berlin, 1929) 41; Hueck & Nipperdey, *op. cit.* n. 32 above, 304; 90 *RGZ*. 173 (Apr. 24, 1917).

³⁶ Compare Nipperdey, *anno.* to 8 *RAG*. 128 (1929).

dustries. Even where an employer has an agreement with a union, it is an open question, which must be decided upon the evidence in each case, whether the labor contract of a non-member of the union is subject to the agreement; for there is no rule of law which makes the agreement applicable.³⁷

As has been noted,³⁸ the closed union shop has been viewed with disfavor by the German courts. The *Reichsarbeitsgericht* has recently given expression to the same attitude in a decision which, although not involving a collective agreement, is sufficiently thoroughgoing to reflect the position of the court with reference to any arrangement that makes employment conditional upon membership in labor organizations. In the case in question an action for damages was brought by a discharged non-union carpenter against thirteen or fourteen members of various unions with whom he had been employed on a job. During the course of the work the defendants had quit work in a body without assigning a reason, after frequent efforts to induce the plaintiff to join a union of his own choosing had failed. Upon inquiry by the employer, objection to the plaintiff was assigned by the defendants as the reason for their quitting. No demand was made for his discharge which, however, followed. The lower court in deciding for the plaintiff found that the defendants intended by their action to produce the result which had ensued and that they knew the depressed labor market would make it difficult for the plaintiff to find another job. The *Reichsarbeitsgericht* thus was faced with the problem of reconciling, if possible, the interest of the unions in maintaining control of employment with the interest of the individual worker

³⁷ 9 RAG. 458 (May 24, 1930). Held, where an employer withdraws from a collective agreement which continues in force as to other employers, there is no presumption that the agreement applies to the labor contract of a union member who is hired subsequently. Even where both parties to a labor contract are members of organizations which have formed a collective agreement, a worker who conceals his membership under circumstances which convict him of bad faith will, according to a recent decision, be denied the benefit of the agreement for the period of the concealment. 9 RAG. 496 (Jul. 2, 1930); 10 RAG. 223 (Oct. 22, 1930), repudiating 4 RAG. 379 (Dec. 8, 1928), 15 St. Louis L. Rev. at p. 19, n. 52. In the earlier case, contrary to the statement in the last-cited footnote, the defendant was a member of the merchants' association which had concluded the collective agreement.

³⁸ 15 St. Louis L. Rev. at p. 29.

in remaining free from organizations which for one reason or another are distasteful to him. The case contained no elements of abuse on the part of the defendants, for they had been careful to present to the employer the simple alternative of dispensing with the plaintiff's services or with theirs, with no threats of any kind. The plaintiff, moreover, had been allowed the utmost freedom of choice among union organizations. Nevertheless the court affirmed the judgment for the plaintiff, giving utterance in its opinion to the following "principles":

It is an undeniable proposition that the legislative power has not in any manner, either in the Constitution or in previous or subsequent social or labor legislation, diminished the natural freedom of the individual to remain outside of all economic associations, but on the contrary . . . has expressly recognized the equal rights of organized and unorganized workers. . . It should not be overlooked that the legitimate efforts of the unions to increase their strength by adding to their membership should be recognized alongside the freedom of the individual and that in order to give effect to these efforts a certain amount of pressure upon unorganized workers in order to induce their assumption of membership can under some circumstances be employed and should not lightly be regarded as illegal or wrong. . . The coercive powers of organizations or of organized workers, however, reach their obvious limit when a particular mode of exerting pressure violates the basic principles of the legal order or involves injury to the opposing party which is out of all proportion to the benefit being sought and which leads to unsocial harshness and wrongs. Such will always be the case when the economic existence of the . . . weaker, unorganized individual is seriously threatened and endangered by the economically stronger organization or its members . . . such a mode of dealing runs counter under any circumstances to the sense of propriety of all reasonable and right-minded persons.³⁹

Thus the inevitable conflict between individualism and collectivism continues to trouble the courts of Germany as well as of other countries, and it is once more demonstrated that explicit legislation is necessary to enable the latter to prevail over the former upon any important point. Only where the Minister of Labor has extended a collective agreement is there a full

³⁹ 6 RAG. 427 (Apr. 24, 1929).

legal sanction to insure the control of all individual labor contracts by the agreement. In other cases the union must either continue to strive for the voluntary adherence of workers and employers or, where an agreement is negotiated or imposed in conciliation proceedings, seek to incorporate a provision that would make it the duty of the single employer or the association with which it contracts to promote the incorporation of the agreed terms into the individual labor contracts of non-union workers. Agreements providing for the closed shop and efforts to secure the discharge of non-union employees are illegal. It is, of course, a question whether any arrangement which extends the benefits of a collective agreement to workers who do not support the union that negotiated it is actually a benefit to the latter or its members;⁴⁰ yet under the German law there does not seem to be a satisfactory alternative.

In contrast to the legal limitation upon aggressive union tactics stands the freedom of the employer under an earlier decision of the *Reichsgericht* which does not appear to have been departed from. In that case the plaintiff was a union, suing an employer on account of his successful efforts to compel the resignation of several of the plaintiff's members who were his employees, which he accomplished by threats of discharge. The decision was for the defendant despite Article 165 of the Constitution, whereby "The organizations of the two groups of interests [in employment] and the agreements entered into by them are recognized." This provision, said the court, is not capable of direct enforcement but requires legislation to carry it out.⁴¹ Article 159 of the Constitution,⁴² which is the real basis of "freedom of association" in Germany, is more direct in its operation. It is, however, taken to mean chiefly that the individual is protected in his right to decide whether he will associate himself with others and to choose freely the organization to which he will belong. Accordingly the workers themselves in the instant case might have sued their employer on account of

⁴⁰ See 15 ST. LOUIS L. REV. at pp. 45-46.

⁴¹ 113 RGZ. 33 (Feb. 11, 1926).

⁴² "Freedom to combine for the protection and betterment of their condition of labor and their economic position in general is guaranteed to all in all occupations. All agreements and measures which tend to restrict or abrogate that freedom are contrary to law."

his coercion of them.⁴³ Contracts whereby individuals agree upon associated action are, also, enforceable.⁴⁴ But, according to the court, no right is vested in a trade organization to defend itself against efforts to alienate its members even when the doctrine of liability for acts *contra bonos mores*⁴⁵ is taken into account.⁴⁶ In the case in question there was no collective agreement in force between the union and the defendant. If there had been, the defendant's acts would have been a breach of his duty to further its observance. But, paradoxically, no such duty attaches to employers who merely are members of associations which conclude collective agreements; for the duty to promote the observance of such agreements is obligatory in character and is limited to the immediate contracting parties.⁴⁷

IV. THE FUTURE OF THE GERMAN SYSTEM

In estimating the probability of the continuance of the German system of control of employment by collective agreement it is important to distinguish the factors that arise out of Germany's present international position from those which are part of the system itself. The pressure of reparations obligations and the attendant necessity of cutting production costs in an effort to export an abnormal quantity of products are, of course, inconsistent with a system of industrial democracy whose purpose is to secure to the workers a larger share in the product of industry. Even if it be conceded that resistance to wage cuts, which the system makes more possible, is fatal to the nation's enforced objective, it does not follow that a similar system would not be successful under more normal circumstances. Indeed, the maintenance of adequate purchasing power on the part of consumers, which industrial democracy and collective bargaining promote, appears to be a prime necessity in an economic

⁴³ "A person who infringes a statutory provision intended for others [Art. 159 of the Constitution] . . . is bound to compensate him for any damage arising therefrom." *BGB*. sec. 823. See 15 ST. LOUIS L. REV. at p. 39, n. 104 for the operation of the German Bill of Rights.

⁴⁴ 111 *RGZ*. 199 (Jul. 2, 1925).

⁴⁵ 15 ST. LOUIS L. REV. at p. 13.

⁴⁶ Nipperdey, *DIE GRUNDRECHTE UND GRUNDPFLICHTEN DER REICHVERFASSUNG* (1930) contains a detailed discussion of the effect of Art. 159 and of other legislative measures bearing upon freedom of association.

⁴⁷ 15 ST. LOUIS L. REV. at pp. 12-15 and 42-43.

system that cannot profitably use or export its accumulations of capital. Accordingly the failure of the system here under consideration, if it were to come about because of the international situation, would not indicate that the system was poorly devised to meet the needs of a rational economic order.

In so far, however, as the sanctions which support control by collective agreement are inadequate in the face of opposition arising from more or less normal causes, the system may be said to be poorly devised. Thus a considerable amount of opposition from employers is to be expected, as well as a tendency on the part of workers to violate their obligations when such a course appears to be to their advantage. To meet the foregoing dangers, two sets of safeguards appear to be necessary. A genuinely intelligent and fair-minded administration is indispensable. In addition, supporters of the system must develop an adequate political strategy as well as resort occasionally to legal remedies if the opposition of some employers is to be kept from impairing the system. To deal with breaches by the workers, a general consciousness of the morally binding nature of collective agreements must go hand in hand with effective legal measures for checking violations. It is perhaps significant that the system has maintained and apparently strengthened itself in Germany for thirteen years and that the principal target of the opposition, at least for the present, is a feature which probably is not fundamental. At the same time more effective legal control over unregistered associations, prohibition of the same organization's entering into inconsistent agreements, and more adequate remedies against employers who use their economic power to combat labor organizations would seem to be desirable changes.